Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	)	
	)	
Alliance Contact Services, et al.	)	**CG Docket No. 02-278**
	)	
Petition for Declaratory Ruling that the FCC has Exclusive Regulatory Jurisdiction Over Interstate Telemarketing	))	**DA 05-1346**

COMMENTS OF THE ATTORNEY GENERAL OF THE STATE OF NEW JERSEY

INTRODUCTION

The Attorney General of New Jersey submits this Comment in response to the petition filed by Alliance Contact Services, et al. (the "Joint Petitioners") requesting a declaratory ruling that the Federal Communications Commission has exclusive regulatory jurisdiction over interstate telemarketing (the "Joint Petition"). By submitting this comment, the Attorney General of New Jersey expressly states that he is not waiving the sovereign immunity of the State of New Jersey, nor is he submitting himself or the State of New Jersey to the jurisdiction of the Federal Communications Commission (the "Commission"). Rather, the Attorney General of New Jersey expressly reasserts his objections to the jurisdiction of the Commission to resolve the matters presented by the Joint Petition, as set forth more fully in the Attorney General's Motion to Dismiss, Comment and Reply Comment submitted in response to the Petition of the American Teleservices Association, Inc. seeking a declaratory ruling preempting certain provisions of New Jersey's Consumer Fraud Act and the regulations promulgated thereunder (the "ATA Petition").[1] The Attorney General of New Jersey further reasserts his right to argue the merits of this dispute in the appropriate forum. However, having reviewed the Joint Petition, the Attorney General of New Jersey determined it appropriate to submit this comment to address the issues raised in the event the Commission determines it has jurisdiction to decide the issues raised in the Joint Petition.

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1 Commission Docket No. DA 04-3185.

ARGUMENT

State regulation of telemarketing is designed to achieve goals similar to federal law: to protect consumers from unwanted telemarketing calls "in a way that protects the privacy of individuals and permits legitimate telemarketing practices."[2] Joint Petitioners attempt to create the appearance of inconsistency and confusion by citing to the laws of various states, and painting it as a hardship for telemarketers to comply with the state laws in order to call the citizens of those states. The Attorney General of New Jersey respectfully submits that there are a variety of state laws with which companies desiring to do business with citizens of a state must comply, and that compliance with state telemarketing regulations is simply no different than compliance with the other laws required to do business in a particular state.

Moreover, rather than filing a petition seeking preemption of specific statutory or regulatory provisions, the Joint Petitioners assert that a "jurisdictional approach" is more appropriate than a conflict approach to resolve the challenges. The "jurisdictional approach" however, is based on an incorrect premise: that Congress has conferred on the Commission exclusive regulatory jurisdiction over interstate telemarketing. As the Attorney General of New Jersey has argued in his Comments submitted in response to the ATA Petition, and as reiterated below, there is no basis in either law or fact to find that Congress either expressly or inferentially intended for the Commission to occupy the field of telemarketing regulation. Such a result would be contrary to law, and fly in the face of the States' long and recognized history of protecting the rights of their citizens to be left alone in their homes.

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[2] Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243, § 2(9) (Congressional findings).

THE TELEPHONE CONSUMER PROTECTION ACT DOES NOT PREEMPT STATE CONSUMER PROTECTION LAWS

The Supremacy Clause of the Constitution[3] grants Congress the power to preempt State law. There are essentially three circumstances where preemption will be found to occur: express preemption, where Congress explicitly defines the extent to which federal law preempts State law; field preemption, where Congress intends federal law to completely occupy the field, leaving no room for State regulation; and conflict preemption, where it is impossible to comply with both State and federal requirements, or where State law serves as an obstacle to accomplishing the full objectives of Congress.[4]

Courts will ordinarily apply a presumption against preemption. In the absence of a clear statement by Congress to the contrary, courts will presume Congress did not intend to preempt State law.[5] The presumption against preemption is particularly strong when discussing the preemptive effect of administrative regulations. The Supreme Court has stated that inferring preemption whenever an agency has dealt with a problem comprehensively is "virtually tantamount" to saying that the agency's regulations will be exclusive whenever an agency chooses to regulate in a particular field, and that such a result would be inconsistent with the federal-state balance in Supremacy Clause jurisprudence.[6]

Consumer protection laws are considered part of the States' police powers, allowing States to protect consumers against unconscionable commercial practices and protecting the well-being of their citizens.[7]

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3 U.S. Const. art. VI, cl. 2.

4 *Mayo v. Dean Witter Reynolds, Inc.*, 258 F. Supp. 2d 1097, 1107-08 (N.D. Cal. 2003) (citing *Industrial Truck Ass'n Inc. v. Henry*, 125 F.3d 1305, 1309 (9th Cir. 1997)).

5 *Gregory v. Ashcroft,* 501 U.S. 452, 461 (1991); *see also Ting v. AT&T*, 319 F.3d 1126, 1136 (9th Cir. 2003) ("the purpose of Congress is the ultimate touchstone").

6 *Hillsborough County v. Automated Medical Labs.,* 471 U.S.707, 717 (1985).

7 *See Edenfield v. Fane,* 507 U.S. 761, 768-69 (1993); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996).

The Supreme Court has recognized that States may legislate to protect consumers against unwanted intrusions into their homes, and that governments may legislate to protect consumers from unwanted speech entering their homes.[8] Accordingly, consumer protection laws have been found to be subject to a heightened presumption against preemption.[9]

By taking a "jurisdictional approach", Joint Petitioners are asserting that provisions of the Communications Act of 1934,[10] the Telephone Consumer Protection Act ("TCPA"),[11] and the Commission's regulations provide a basis for finding either express or field preemption of State consumer protection laws, including the New Jersey Do Not Call Law and Regulations. The Joint Petitioners reject the conflict preemption approach taken by organizations, such as the ATA, in other petitions. Accordingly, in this Comment the Attorney General of New Jersey will address only the issues of express and field preemption. For a discussion of why the Attorney General of New Jersey believes that there is no conflict between federal and state law, the Commission is respectfully referred to the Reply Comment of the Attorney General of New Jersey submitted in response to the ATA Petition.

A. The TCPA Does Not Expressly Preempt State Law

The intent of Congress is generally the primary factor in determining whether State law is preempted. Notwithstanding the Joint Petitioners' references to a letter from the Commission staff or statements of Senators at the time of the enactment of the TCPA, the language of the statute is the principal source for determining Congressional intent. Contrary to the contentions of the Joint Petitioners, neither the TCPA nor

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[8] *Frisby v. Schultz*, 487 U.S. 474, 484-85 (1988). Indeed, the Commission has recognized the viability of such laws. In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, 20 FCC Rcd 3788, 2005 WL 418189 at fn32 (February 18, 2005).

[9] *California v. ARC America Corp.*, 490 U.S. 93, 101 (1989).

[10] 47 U.S.C. § 152(a).

[11] 47 U.S.C. § 227 (2001).

the Communications Act of 1934 contains any express statement of preemption which would form the basis for a claim of exclusive jurisdiction of the Commission. Indeed, the contrary is true.

The Communications Act of 1934 grants the Commission jurisdiction over "all interstate and foreign communication by wire and radio."[12] The Commission has interpreted this provision to mean that it has "exclusive jurisdiction over the rates, terms and conditions of interstate communications"[13] and that states may not "regulate the rates or other terms and conditions under which interstate communications service may be offered in a state."[14] Joint Petitioners' selective quoting from the Commission's decision in In re Operator Services Providers of America Petition for Expedited Declaratory Ruling ("OSPA Decision") suggests that the Commission construes its authority far more broadly than the decision would warrant. Indeed, in the OSPA Decision, the Commission concluded that the Communications Act of 1934 "established Congress' intent to have this Commission exclusively regulate the rates, terms and conditions of interstate operator services."[15] Thus, although the Commission construes its authority broadly, the language of the decision clearly indicates the Commission's recognition that its authority extends to the provision of communications services, rates, and the usage of the lines. Such a conclusion is consistent with the traditional interpretation of the Commission's authority to regulate the "instrumentalities and facilities used in the transmission and reception of interstate communications."[16] Regulation of unsolicited telemarketing sales calls by the States

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12 47 U.S.C. § 152(a).

13 In re Operator Services Providers of America Petition for Expedited Declaratory Ruling, 6 FCC Rcd 4475, ¶ 10 (July 11, 1991) ("OSPA Decision").

14 OSPA Decision, ¶ 11.

15 OSPA Decision, ¶ 7.

16 Orth-O-Vision, Inc. Petition for Declaratory Ruling, 69 F.C.C.2d 657, 666 (1978), *cited by* OSPA Decision, fn 17; *see also City of New York v. F.C.C.*, 486 U.S. 57 (1988)(holding that FCC has jurisdiction to preempt laws regarding "technical standards" for provision of cable television services).

does not fall within this prohibition, as the Do Not Call laws do not regulate rates, instrumentalities or facilities for communications services; rather, Do Not Call laws are properly classified as consumer protection laws, which have traditionally been within the authority of the individual states.

A review of the language of Section 227(e) of the Telephone Consumer Protection Act leads to the same result. Section 227(e), "Effect on State law," provides:

> **(1) State law not preempted**
> Except for the standards prescribed under subsection (d) of this section and subject to paragraph (2) of this subsection, nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits --
>> **(A)** the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements;
>> **(B)** the use of automatic telephone dialing systems;
>> **(C)** the use of artificial or prerecorded voice messages; or
>> **(D)** the making of telephone solicitations.

The "or" in the clause "or which prohibits" signals that the option of a State imposing requirements which prohibit the making of telephone solicitations is distinct from the clause excepting from preemption more restrictive intrastate requirements imposed by States. This construction acknowledges the States' long history in regulating telemarketing, and permits the States to continue to protect their consumers.

The Commission itself has acknowledged the States' history in regulating telemarketing, and that the TCPA outlines a role for the States in the regulatory process.[17] In recognizing the States' long history in enforcing telemarketing laws, the Commission noted that the long-arm statutes under which States have historically enforced those laws "may be protected under section 227(f)(6) which provides that 'nothing contained in this subsection shall be construed to prohibit an authorized State official from proceeding in State court on the basis of an alleged violation of any general civil or criminal statute of such State.'"[18] The

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17 Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Dkt. No. 02-278, Report and Order, 18 FCC Rcd 14014 (2003) ("Commission Order"), ¶ 75.

18 Commission Order, ¶ 85.

Commission has also recognized what it perceives as an "ambiguity" in the savings clause: "This provision [227(e)(1)]is ambiguous, however, as to whether this prohibition applies both to intrastate and interstate calls, and is silent on the issue of whether state law that imposes more restrictive regulations on interstate telemarketing calls may be preempted."[19] Joint Petitioners note this comment, but dismiss it as the Commission "mudd[ying] the waters" rather than acknowledging what they must: the language of the TCPA does not provide a clear statement of express preemption of State law governing interstate telemarketing. To the contrary, the language supports the position of New Jersey, the other States that have filed comments relating to the petitions filed against them, and indeed, even the position acknowledged by the Commission, that the TCPA does not preempt state law insofar as it prohibits the making of telephone solicitations to those consumers on the Do Not Call list.

B. Field Preemption is Neither Authorized Nor Warranted

Field preemption occurs when Congress has legislated so comprehensively that there is no room for States to supplement federal law.[20] Federal occupation of a field may only be found when there is clear evidence of Congressional intent, or where the nature of the regulated subject matter permits no conclusion other than that preemption is warranted.[21]

Contrary to the contention of the Joint Petitioners, field preemption is neither intended by Congress nor warranted by the circumstances. First, the language of the TCPA does not support a finding that Congress intended the Commission to occupy the field. In numerous places in the statute, there is mention of State regulation of telephone solicitations and States administering or enforcing State law. For example,

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19 Commission Order, ¶ 82.

20 *Louisiana Public Service Comm'n v. F.C.C.*, 476 U.S. at 368 (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947)).

21 *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 142 (1963)

the statute provides that if the Commission chooses to establish a single national database of residential subscribers who object to receiving telephone solicitations, the regulations shall "be designed to enable States to use the database mechanism selected by the Commission for purposes of administering or enforcing State law."[22] Thus, the language of the TCPA expressly recognizes States' continued ability to regulate telephone solicitations, and thereby precludes the application of field preemption.

Further confirmation that field preemption is not warranted is provided by the Do-Not-Call Implementation Act ("DNCIA").[23] The DNCIA requires the Commission to issue a final rule under the TCPA, and requires the Commission to "consult and coordinate with the Federal Trade Commission to maximize consistency with the rule promulgated by the Federal Trade Commission,"[24] following promulgation of regulations relating to the do-not-call registry. The DNCIA also requires the Commission and the Federal Trade Commission to transmit an annual report which shall include, among other things, "an analysis of the progress of coordinating the operation and enforcement of the 'do-not-call' registry with similar registries established and maintained by the various States."[25] In enacting the TCPA and the subsequent DNCIA, Congress has expressly recognized that jurisdiction in the area of regulation of telemarketing and do not call operation and enforcement lies not only with the federal agencies, but also with the States.

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[22] 47 U.S.C. § 227(c)(3)(J) (emphasis added).

[23] 15 U.S.C. § 6101; Pub. L. 108-10.

[24] Do Not Call Implementation Act, Pub. L. No. 108-10, § 3. The USA PATRIOT Act, P.L. 107-56 (2001), granted the Federal Trade Commission also the authority to prescribe rules prohibiting deceptive or abusive telemarketing acts or practices, including telemarketing for solicitation of charitable contributions or donations. *See also Nat'l Federation of the Blind v. F.T.C.*, 303 F. Supp. 2d 707, 716 (D. Md. 2004) (recognizing that the F.T.C. was given authority by Congress to regulate abusive telemarketing practices). Thus, it is clear that Congress did not grant exclusive jurisdiction of interstate telemarketing to the Commission.

[25] *Id.* at § 4(b)(4).

Citing *City of New York v. Federal Communications Commission,*[26] the Joint Petitioners argue that even if the TCPA and the Communications Act do not grant the Commission exclusive jurisdiction, the Commission has the ability to categorically preempt state regulation of interstate telemarketing. The Joint Petitioners, however, overlook the requirement that proper circumstances are required for such a preemption determination to be made. Specifically, the agency must be acting within the scope of its Congressionally delegated authority.[27] An agency cannot confer power upon itself, and it may not expand its power when Congress has acted to limit its jurisdiction.[28] At issue in the *City of New York* case was the jurisdiction of the Commission to regulate technical standards for cable television. Regulation of such an area is consistent with the historical jurisdiction of the Commission over the instrumentalities and facilities used for communications, including cable television. With respect to regulation of telephone solicitations, Congress has provided for jurisdiction by multiple entities -- the Commission, the Federal Trade Commission, and the States. For the Commission to declare that State laws are preempted would in essence be the Commission conferring a far greater jurisdiction upon itself than Congress has granted. "To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress. This we are both unwilling and unable to do."[29]

Joint Petitioners also suggest that the Commission has acted in other situations to preempt state law even where there is no express authority to do so. The cases and orders cited by the Joint Petitioners, however, involve areas where the Commission has traditionally had broad authority, notably rates and provision of communications and related services. Regulation of unsolicited telemarketing sales calls is not

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[26] 486 U.S. 57 (1988).

[27] *Id.* at 63-64 (quoting *Louisiana Public Service Comm'n v. F.C.C., supra,* 476 U.S. at 368-69).

[28] *Louisiana Public Service Comm'n v. F.C.C., supra,* 476 U.S. at 374.

[29] *Id.* at 374-75.

an area traditionally regulated by this Commission, and cannot be considered to be the same as the regulation of rates, services, instrumentalities and facilities offered by communications service providers.

CONCLUSION

The Attorney General of New Jersey respectfully requests, in the event the Commission determines that it has jurisdiction to decide this matter, that the Commission reject the contentions of the Joint Petitioners and deny the requested relief.

Respectfully submitted,

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